No. 159

Supreme Court of the United States.

OCTOBER TERM, [illegible].

No. 152.

CITY OF COVINGTON, Plaintiff in Error,

Vs.

THE COMMONWEALTH OF KY., Defendant.

BRIEF FOR PLAINTIFF IN ERROR.

STANDARD PRINTING CO., [illegible], KY.

Supreme Court of the United States.

CITY OF COVINGTON, Plaintiff in Error,

Vs.

THE COMMONWEALTH OF KY., Defendant.

BRIEF FOR PLAINTIFF IN ERROR.

There is but a single question involved in this case, and that is: Is the reservoir, pumping-house, machinery, pipes, mains and appurtenances constituting the water-works of the plaintiff in error, subject to State taxation?

By an act of the Kentucky Legislature, passed on May, 1, 1886, the city of Covington was authorized to purchase land and construct upon it water-works. (In the record it is dated 1896, which is an error.) City bonds were authorized to be issued and sold to the amount of $600,000.00, and, by amended legislation, the city was empowered to issue, in addition, $400,000.00 of bonds, making in all, one million. The act, and its amendments, are fully set forth in the first paragraph of the answer of the City of Covington on pages 1, 2, 3 of the record.

It was also provided, by the Act of May 1, 1886, that the questions of issuing these bonds, and of the proposed location of the reservoir, should be submitted to the voters of the city, and, if a majority of the votes cast favored the location of the plant, etc., the bonds were to be issued as needed for the purposes of construction.

By section 31 of the Act, it is provided: "Said reservoirs, pumping-house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from State, county and city taxes."

After the construction of this plant, the State imposed a tax of 42½ cents upon each one hundred dollars of assessed property for the year 1894, and the sheriff proceeded to levy and sell the land, etc., upon which this plant stood, for the State taxes for that year, the contention being: There was no consideration for the exemption, and, if there had been, that subsequent legislation had repealed the exemption, and, therefore, the property was subject to State taxation.

Second. It is also maintained by the State that the provisions of the Act of 1886, in force at the time this amendment to the charter was enacted, and now in force, was a reservation by the State of the power to repeal this amendment. That Act provides:

"That all charters and grants, of or to corporations, or amendments thereof enacted or granted, since the 14th of February, 1856, and all other Statutes, shall be subject to repeal at the will of the General Assembly, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested."

On behalf of the Plaintiff in Error it is contended: That the legislative intent to exempt this property from taxation is so plainly expressed as not to admit of controversy, and, for the express purpose, when accepted, of creating an irrevocable contract between the State and the City of Covington, and that the general law repealing this exemption is in violation of section 10, article 1 of the Constitution of the United States.

Second. It is in violation of section 170 of the State Constitution, providing: "There shall be exempt from taxation public property used for public purposes."

It is a contract by which the City of Covington undertook, in discharge of a public duty, to render a public service, and, to enable it to do so, placed upon its citizens this heavy burden, by way of taxation, to accomplish the object in view. Section 21 of this amended legislation recites that these works are to be constructed "to the end that the City of Covington and the citizens thereof may be furnished with an ample supply of pure water *for all purposes*."

As said by the Court, in the case of the Town of West Hartford vs. The Board of Water-works, reported in 44 Conn., page 367:

"The introduction of a supply of water for the preservation of the health of its inhabitants, by the city of Hartford, is unquestionably now to be accepted as an undertaking for the public good in the judicial sense of that term; not, indeed, as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order."

In the case of the State of Ohio vs. City of Toledo, and the State vs. Hosler, 48 Ohio State, 112, the question

arose as to whether the furnishing of natural gas, by the city, was for a *public purpose?* The Court saying, that while "the benefits and conveniences offered may not be embraced by all, they are, notwithstanding, designed for the general advantage, and subserve what is recognized as a public purpose." This case might fall within the rule laid down in those cases, and, under the former Constitution, where the exemptions exist, be in consideration of public service. The City of Covington, in a governmental sense, is performing a public service in providing water to its citizens.

It is insisted, however, that the Court of Appeals of Kentucky, as well as this Court, has disposed of this question in the case of the Louisville Water Co. vs. Clark, reported in 143 United States, page 10, in holding that the general reservation of power, in the Act of 1856, was a part of the contract in that case, and when the charter was acquired, the right to withdraw the immunity from taxation depended on the legislative will.

The Louisville Water Co. was originally a private corporation, and the Sinking Fund of the City acquired the stock, by purchase, and there was no such condition in the grant as prevented the Legislature from repealing that provision of the charter exempting it from taxation. That no right was taken from it, save the immunity from taxation, and the power to do this was expressly reserved by the Act of 1856.

In the case being considered, the Plaintiff in Error, upon the faith of this exemption from taxation, submitted the question to the tax-payers of the city, as to whether this $600,000.00 in bonds should be issued and sold as

required by the act, and, as an inducement to accept the provisions of the act, section 61 of the amended charter expressly exempted the plant from taxation.

The Legislature said to the City of Covington, if by a popular vote of your people you will agree to perform this public service, the property purchased with the proceeds of these bonds shall not be taxed. The amendment was accepted and the citizens agreed to be taxed on the faith that this, as well as every other provision in the charter, would be complied with.

It was certainly not contemplated by the parties to this legislation that the Plaintiff in Error, when undertaking to construct this plant and subject its citizens to a taxation of one million dollars for that purpose, that the Legislature at its pleasure could repeal the amendment and impose the tax, when the exemption from this burden was one of the principal inducements of the citizens to vote for the measure.

That the Legislature had the power to authorize the municipality of the City of Covington to issue these bonds is not doubted. Pure water is indispensible to the health and comfort of the inhabitants of any city, and, when devoted, as this plant is required, to the "furnishing the city and its people with an ample supply of pure water for all purposes," it is rendering a public service, nor will it be conceded, that, under the former Constitution or the the present Constitution, the Legislature transcends its power, in any manner, in exempting such property from taxation, by an agreement, as in this case, when the use and proceeds of such property are alone devoted to public and municipal purposes.

These municipal corporations are the mere agencies of the State and a delegation of power to do that which, in a governmental sense, is necessary for the health and comfort of those living within the municipality, is in derogation of no private right, nor an unjust discrimination on the part of the State, when imposing the burden of taxation.

NEW CONSTITUTION.

The present Constitution not only comes in aid of the construction placed upon this legislation by the Plaintiff in Error, but settles the point in controversy.

Section 170 of the present Constitution, Kentucky Statutes, page 132, in express terms, specifies the property exempted from taxation. It provides: "*There shall be exempt from taxation public property used for public purposes;*" and, by this same section, the Legislature is given the *power to authorize* cities and towns to exempt manufacturing establishments from municipal taxation for the period of five years.

The contention, by the State is, that this clause of the present Constitution, adopted in the year 1891, being prior to the levy and sale of the property of the Plaintiff in Error, applies only to such public property as is indispensible to the administration of the municipal government, such as station-houses, court-houses, etc., and in support of this contention, reference is had to the case of the City of Louisville vs. Commonwealth, reported in 1st Duvall, page 295, where the Kentucky Court of Appeals, under a statute then in existence, that provided:

"Houses of public worship and land held under the

"laws of this State by any denomination of Christians, or "professors of religion, for devotional purposes, to the "extent of five acres, and the land upon which any semi- "nary of learning is erected, to the extent of five acres, "held fiducially or individually, and custom-house, post- "office building, court-room or other necessary offices or "hospitals, built or owned by the United States, including "the lots of ground on which they are erected, and all "libraries, philosophical apparatus, owned by any semi- "nary of learning, and all church furniture and books for "the objects and uses of religious worship, shall be exempt "from taxation and may not be listed by the assessor."

With such an act then under consideration by the Court of Appeals of Kentucky, more than thirty years past, it might well be said that the Act was such a restriction of judicial power as to confine the Court to the exemption of such property as was absolutely essential to the existence of municipal government, and the Court, through Mr. Justice Robertson, in that case, said:

"But neither the State nor a county has ever been considered a person contemplated by any tax law ever enacted. And does not the only reason for these constructive exclusions equally exempt the municipal property of Louisville, used for the convenience and facility of its local government? We think so; and, without elaborate argument, so adjudge. The exceptions specified in the Statute, as herein quoted, do not imply that municipal property, used for public purposes of local government, was intended by the Legislature to be subject to taxation."

If the constitutional provision of 1891 had been found in this Statute, viz: "*There shall be exempted from taxation public property used for public purposes*," can there be any doubt but the learned Court would have held that

engines, engine-houses, etc., were not only essential, but used for public purposes? They might be dispensed with for governmental purposes, but, at this late day, with the necessity for water and light to the inhabitants of any city, it would be idle to say that the city, the owner of its water-works, so essential for the health of its inhabitants, so necessary for preventing conflagration and the destruction of the dwellings of the citizens by fire, that the use of such works, with the fire engines necessary to make them effectual, was not public property devoted to public purposes. Can it be said that the water-works, the fire-engines and the gas-light, when owned by the city, is private property for private gain, under section 170 of the State Constitution?

The fact that the water-works belongs to the local public and are used for local public purposes, can make no difference. We might argue, in fact, that such works are now essential to the proper administration of a city government, but, if not, it is within the meaning of the Constitution, public property used for a public purpose.

In the case of the New Orleans Gas Co. vs. The Louisiana Gas Light Co., 115 U. S., 650, this Court said: "But as the distribution of gas in thickly populated districts is a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as authorizes the Legislature to grant the exclusive privilege."

It is clear that this public property, applied to public use, is exempt from taxation under the present Constitution; and, that neither the case in 1st Duvall nor the case of Clark vs. The Water Co., reported in 143 U. S., settles the question to the contrary.

In the case of the Commonwealth vs. McKibben, County Judge, reported in 90 Ky., 384, the original grant contained no clause of exemption, and the Court of Appeals of Kentucky, following the case in 1st Duvall, held the exemption unconstitutional, conferring the right of exemption to such property as was necessary to carry on the government of the city.

The citizens of Covington are taxed to pay the principal and interest on these bonds—they are then taxed for the water they use, "and the net revenue derived from the Water-works, if any, shall be applied exclusively to the improvement or reconstruction of the streets or other public ways of the city." (Kentucky Statutes, section 3104.

It is difficult to perceive how this charter of property is to be termed *private* property for private use or public property for *private* use.

The Kentucky Court of Appeals has not construed this provision of the new Constitution referred to, but, that it is public property applied alone to public use, should not admit of controversy. The demurrer to the answer of the Plaintiff in Error should have been overruled.

We ask a Reversal.

William Goebel

W. S. Payne

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[FOR CITATIONS, SEE NEXT PAGE.]

CITATIONS.

Section 10, Article 1, Constitution of United States.

Town of West Hartford vs. Board of Water-Works, 44 Conn., page 367.

State of Ohio vs. City of Toledo,
State of Ohio vs. Hosler,
} 48 Ohio State, p. 112.

Louisville Water Co. vs. Clark, 143 U. S., page 10.

City of Louisville vs. Commonwealth of Ky., 1 Duvall, page 295.

New Orleans Gas Co. vs. Louisiana Gas Light Co., 115 U. S., page 650.

Commonwealth of Ky. vs. McKibben, County Judge, 90 Ky., page 384.

Section 170 of the present Constitution of Kentucky, which is as follows:

"Section 170. Property exempt—Cities may exempt Manufactories. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the

income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location."

Section 3104, Kentucky Statutes:

"Revenue from Water-works Applied to Public Ways. The net revenue derived by any city of the Second Class from its Water-works shall be applied exclusively to the re-improvement or reconstruction of the streets and the other public ways of the city."